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BRIEF FOR THE RESPONDENT UNION

The citations to the opinion below, the basis for this Court's jurisdiction, and the statutory provisions involved are correctly set forth in petitioner's brief, at pp. 1-4, with the exception that petitioner fails to set out as one of the statutory provisions involved § 8(b)(2) of the National Labor Relations Act, as amended, 29 U.S.C. § 158 (b)(2), which reads as follows:

> It shall be an unfair labor practice for a labor organization or its agents—. . .
>
> (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

STATEMENT OF THE CASE

Respondent Sheet Metal International Association, Local No. 6 ("the Union") operates a referral system for employees who wish to obtain work with employers who are members of two employer associations. Joint Appendix ("Jt. App.") 54-58. The collective bargaining agreement between the Union and two employer associations provides that the Union will refer employees upon request by employers, but does not specify precisely how the employees referred are to be selected. Jt. App. 29.

The district court described the general operation of the referral system as follows:

> [The] Union does not maintain an exclusive hiring hall system. There are several options available to members through which one may secure employment. First, a member may have his name placed on the out-of-work list maintained by [the Union] at the Union hall. Second, a member may have his name placed on a separate list authorizing the defendant to refer him for work under the Specialty

> Agreement, a separate collective bargaining agreement negotiated to cover work on siding, decking, and metal buildings. Third, a member may solicit employment on his own, in addition to being signed up on the referral lists. . . .
>
> When an employer contacts the Union for workers, and does not request workers by name, the Union begins at the top of the list and attempts to telephone each member in the order they appear on the list. . . . An employer may request for referral specific employees by name. . . . Members have the right to either accept or refuse a job referral. [Pet. App. A5-A6.]

Lynn L. Breininger, the plaintiff in this case (and petitioner in this Court) is a member of the Union and has been a member since the 1950's. R28, at p. 19. Breininger was therefore familiar with the Union's job referral system, including the fact that he was free to obtain jobs on his own. At no time did Breininger sign the out of work list for the specialty agreement. Jt. App. 58; R28, at p. 46.

In this lawsuit, petitioner contests the manner in which the Union operated its referral system; specifically, he maintains that he was not sent to a job for which he was specifically requested (R28, at 56-66); that he was not referred to jobs, including a specialty job, in the order in which his name appeared on the general out of work list (R. 26); that the contractual requirement that job requests be confirmed in writing was not uniformly complied with (Jt. App. 29; R. 26); and that some, but not all, of the employees who were referred to jobs to which petitioner believes he should have been referred were, unlike him, members of a group that backed the union administration (although one of the employees referred ahead of petitioner was the very individual who petitioner had backed for union office against the present administration). Jt. App. 18-19; R28, at 175-176. The Union maintained, in contrast, that its referral procedures had been properly followed. Jt. App. 57-58.

Petitioner's first amended complaint alleges two causes of action: The first, invoking §§ 1, 8 and 9 of the National Labor Relations Act, as amended, 29 U.S.C. §§ 151, 158(b), and 159, contends that the Union breached a duty of fair representation owed to petitioner by "refusing to honor employer requests for plaintiff's employment, . . . refusing to properly administer the job seniority list, and . . . refusing to process or acknowledge [petitioner's internal union] charges." Pet. App. A20. The second count claims that "in making job referrals, the defendant has favored a fraction of members . . . who have been known to support . . . the present business manager" and that by so doing, the Union has "otherwise disciplined" petitioner in violation of §§ 101(a)(5) and 609 of the Labor Management Reporting and Disclosure Act, 29 U.S.C. §§ 401(a)(5) and 529. Pet. App. A21.

The district court granted summary judgment for the Union on jurisdictional grounds, holding that since "discrimination in hiring hall referrals constitutes an unfair labor practice under §§ 8(b)(1)(A) and 8(b)(2) of the NLRA," jurisdiction over petitioner's complaint was properly in the National Labor Relations Board, not the courts. Jt. App. A9-A10.

In a brief *per curiam* opinion the United States Court of Appeals for the Sixth Circuit affirmed the dismissal of the NLRA claim on the basis relied upon by the district court. As to the LMRDA cause of action, the Sixth Circuit also affirmed the dismissal, but on the separate ground that petitioner did not demonstrate that he was "otherwise disciplined" within the meaning of the statute:

> The term "discipline" was meant to refer only to punitive actions diminishing *membership* rights." *Finnegan v. Leu*, 456 U.S. 431. . . . Hiring hall referrals are not a function of union membership . . . . [Pet. App. A3.]

SUMMARY OF ARGUMENT

I. Petitioner's first cause of action, for breach of the duty of fair representation, alleges that the Union operated its job referral system "arbitrarily, discriminatorily, and/or in bad faith and/or without reason or cause" (Pet. App. A20), but *not* that the Union acted upon any union-related basis. This cause of action can survive only if: (1) the NLRA makes maladministration of union job referral systems, even though discrimination based upon union activity or lack thereof is neither alleged nor proved, an actionable wrong; and, in addition, (2) such a claim is actionable in the courts rather than before the National Labor Relations Board.

(a) As to the first proposition, §§ 8(b)(1)(A) and 8(b)(2) of the NLRA, added to the Act in the 1947 Taft-Hartley amendments, establish norms of behavior for unions with regard to the operation of job referral systems. Before the Taft-Hartley Act, the Wagner Act, in § 8(3) resolved this question by permitting unions to enter into contracts requiring that all employees be hired through a union referral system open only to union members. The question whether such closed shop arrangements should be allowed to continue, a major issue when the Taft-Hartley amendments were before Congress, was resolved by forbidding the closed shop, along with any other means of making union membership a condition of initial hire, in § 8(a)(3) of the Act, as amended, and by adding to the Act a new section, § 8(b)(2), prohibiting unions from causing or attempting to cause any employer to violate § 8(a)(3).

Section 8(a)(3) has always been understood as forbidding only employer discrimination in hire that is *motivated* by an intention to discriminate on a union-related basis. The legislative history of § 8(b)(2), and of the more general provision, § 8(a)(1)(A), show that Congress' intent with regard to those sections as applied to hiring questions was to parallel the prohibitions applicable to employers, and thus to forbid only discrimination based upon union-related criteria, and not any other form of maladministration of a union job referral system.

The NLRB has had many occasions to address the reach of § 8(b) in this regard, and has often failed to recognize the limitations Congress intended to place on the unfair labor practices governing union referral systems. In *Local 357 Teamsters v. NLRB*, 365 U.S. 667 (1961), this Court struck down an early version of NLRB regulation of union hiring hall arrangements, holding: "Congress has aimed its sanctions only at specific discriminatory practices, the Board cannot go further and establish a broader, more pervasive regulatory scheme." *Id.* at 676. In more recent years, the Board has nonetheless continued, in our view, to violate the Congress' express intent by viewing the Act as regulating such matters as whether union referral systems operate by objective criteria or conform to contractual requirements. The legislative materials, and this Court's opinion in *Local 357 Teamsters*, demonstrates that these Board rulings are wrong, and that the NLRA regulates unions when making job referrals in precisely the same way as the Act regulates employers when hiring on their own; no more and no less. That being so, petitioner's first cause of action here must be dismissed.

(b) Whether the proposition established in the previous section is correct or not, it is at least the case that claims alleging maladministration of union hiring halls should be decided in the first instance by the NLRB, the agency to which Congress committed the enforcement of the NLRA, and not by the lower courts. This Court has expressly so held, in general terms, in *Local 160, United Association v. Borden*, 373 U.S. 690 (1963), and in other cases; the only question in this case is whether the fact that *Borden* and its progeny involved state rather than federal causes of action limits the generality of their language.

There is no basis for so concluding. Rather, as a general matter, under current law the implication of new private causes of action is limited to situations in which

there is an *affirmative* indication that Congress so intended, particularly in situations in which Congress has provided *some* remedies for breach of a statute. This Court's NLRA duty of fair representation cases have created an exception to this principle for particular reasons. *Vaca v. Sipes*, 386 U.S. 171 (1967). None of those reasons apply to causes of action concerning union job referral systems, whether those causes of action are denominated breaches of the duty of fair representation or some other name. Moreover, as a substantive matter, there is no more basis for permitting the courts to imply a substantive cause of action regarding union referral systems that goes beyond the express unfair labor practices that Congress created than there is to allow the Board to do so. Consequently, no judicial cause of action for breach of the duty of fair reprecentation with regard to the operation of union job referral systems should be recognized.

II. (a) There is also a controlling precedent in this Court on petitioner's separate LMRDA course of action: *Finnegan v. Leu*, 456 U.S. 431 (1982) held that "otherwise discipline" within the meaning of §§ 101(a)(5) and 609 of the LMRDA pertains only to "retaliatory actions that affect a union member's rights or status *as a member* of the union" (*id.* at 437). The term does not reach union retaliatory actions generally, nor specifically, those—such as access to a union job referral system—that are not an "incident of union membership." *Id.* Petitioner and his *amici curiae* attempt to limit the generality of this Court's plain language, arguing that to so read the statute would undermine the Act's substantive protections of free speech. But the main office of the "otherwise discipline" language is to describe those circumstances in which procedural protections in connection with the enforcement of otherwise proper union rules are required; there are other remedies available where the union rules are substantively invalid.

(b) There is a second reason why union job referral decisions, discriminatory or otherwise, do not constitute "discipline" within the meaning of the LMRDA.

Union discipline is analogous to the criminal law, and as such is distinguished from other forms of harm caused by union actions by the fact that there is a moral judgment made by the union community as a whole that the disciplined member has violated a rule of behavior promulgated for the good of the group. The language of § 101(a)(5) suggests the criminal law analogy, as do several of the better reasoned cases and commentaries on the term "discipline" under the LMRDA. And this approach yields sensible results, distinguishing situations in which a union, for example, is simply administering a job referral system according to selection criteria, and situations in which ostracism from a job referral system is part of the sentence imposed after a member is found guilty of violating a norm of behavior imposed by the union as an entity. Where, as here, the allegation is that union officials have abused their power for their own benefit in a way detrimental to a member, the essential attributes of "discipline" are absent, and the procedural protections of the Act do not apply (although, of course, if substantive rights protected by § 101 of the Act are denied, there may be a cause of action, not pursued in this case, for that denial).

ARGUMENT

I. THE DUTY OF FAIR REPRESENTATION ISSUE

The plaintiff in this case (petitioner in this Court) seeks to maintain a cause of action against the Union "pursuant to [the National Labor Relations Act ("NLRA")], 29 U.S.C. §§ 151, 158(b), and 159" for "refusing to honor employer requests for plaintiff's employment, . . . refusing to properly administer the job seniority list, and . . . refusing to process and or acknowledge his [internal union] charges." Pet. App. A16, A20.[1] In this regard, petitioner does *not* allege that the

[1] The last allegation—concerning the Union's supposed refusal to process an internal complaint—does not state a good NLRA cause of action for reasons quite different from those discussed in the text with regard to the allegations concerning the administration of the job referral system. As Judge Tamm has explained:

Union's actions were premised upon petitioner's union-related activities or lack thereof. Rather, petitioner alleges for purposes of this cause of action only that the Union, in administering its job referral system, acted "arbitrarily, discriminatorily, and/or in bad faith and/or without reason or cause." Pet. App. A20.

The two interlinked questions raised by this aspect of the complaint are, *first*, whether an employee who claims that a union has violated the NLRA in administering a job referral system must allege (and prove) that the union action complained of was premised on that employee's union-related activities or lack thereof; and, *second*, whether such an NLRA claim may be brought in district court, or must be filed with the National Labor Relations Board ("NLRB") through the processes Congress expressly provided for enforcement of the NLRA's unfair labor practice provisions.[2]

Arising as it does out of a union's privilege under § 9(a) of the NLRA to serve as the employee's exclusive representative, the duty of fair representation is coextensive only with the power of exclusive representation. As we have earlier noted, "a union . . . can be held to represent employees *unfairly* only in regard to those matters as to which it represents them at all—namely, 'rates of pay, wages, hours . . . or other conditions of employment.' In other words, *the duty of fair representation extends only to matters involving an employee's dealings with his employer and ordinarily does not affect an employee's relationship with the union structure.* [*Kolinske v. Lubbers*, 712 F.2d 471, 481 (D.C. Cir. 1983) (emphasis added)]

Because we regard this reasoning as dispositive, we do not further discuss in the text the question whether an employee's dispute with his union concerning the handling of an internal union charge, standing alone, gives rise to a suit for breach of a union's duty of fair representation.

[2] It is worthy of note in this regard that the second count of the complaint—which invokes the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 401 *et seq.* ("LMRDA"), not the NLRA—alleges that petitioner was not referred to jobs because of his political opposition to the Union's leadership. Pet. App. A21. It thus appears that in his NLRA count petitioner could have alleged

The burden of the argument that follows is that in enacting the 1947 Taft-Hartley amendments to the NLRA, Congress expressly considered these questions and struck the balance: so that only adverse union action in administering a job referral system that is premised on union-related activity or the lack thereof is prohibited by the Act; *and* so that claims that a union has violated the NLRA's norms in administering a job referral system are to be addressed to the Labor Board in the first instance through the administrative processes established in § 10 of the Act. From 1935 on, the Act had regulated *employer* hiring decisions and by 1947 it was settled law that the NLRA only prohibits adverse employer hiring decisions based on union considerations and that all claims that such an employer unfair labor practice had been committed are to be filed with the NLRB and not in the lower courts. The 1947 Congress' intent was to impose *exactly the same requirement* on unions that take an active part in the hiring process.

Given the general rules governing the judiciary's limited authority to supplement or alter such Congressional determinations, the petitioner's attempt to transmute his unfair labor practice claim into an implied judicial cause of action must be rejected.

A. The Substantive NLRA Rules Governing Union Job Referral Systems

"Discrimination in hiring hall referrals constitutes an unfair labor practice under §§ 8(b)(1)(A) and 8(b)(2) of the NLRA." *Farmer v. United Brotherhood of Car-*

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that his claim had a nexus to union-related activity and chose not to do so.

To be sure, had he pleaded his NLRA cause of action in that way, petitioner would have been alleging in terms a core NLRA § 8(b)(2 violation, nothing more or less. *See* pp. 9-19, *infra*. And, as this Court noted last term, "Employees, of course, may not circumvent the primary jurisdiction of the NLRB simply by casting statutory claims as violations of the union's duty of fair representation." *Communications Workers v. Beck*, —— U.S. ——, 108 S.Ct. 2641, 2647 (1988).

penters, 430 U.S. 290, 303, n.11 (1977).[3] Indeed, as we now show, in large part § 8(b)(2)'s office is to delineate the appropriate role of unions in serving as a clearing house for employees seeking employment. That section, in conjunction with the more general provisions of § 8(b)(1)(A), has been understood since the enactment of the 1947 Taft-Hartley amendments to the 1935 Wagner Act to establish norms governing union administration of job referral systems. Moreover, from the outset, a central issue has been whether Congress intended to go further in regulating union referral systems than banning refusals to refer on the basis of the union membership or union activities of the employee seeking referrals.

1. As this Court has noted, union hiring halls and job referral systems took hold in response to the needs of employers and employees generated by the special economic circumstances obtaining in certain industries:

> The hiring hall . . . . has served well both labor and management—particularly in the maritime field and in the building and construction industry. In the latter the contractor who frequently is a stranger to the area where the work is done requires a "central source" for his employment needs; and a man looking for a job finds in the hiring hall "at least a minimum guarantee of continued employment." [*Local 357 Teamsters v. NLRB*, 365 U.S. 667, 672-73 (1961) (footnote omitted).]

See generally Fenton, *Union Hiring Halls Under the Taft-Hartley Act*, 9 Lab. L.J. 505 (1958); *NLRB v. International Association of Heat and Frost Insulators*, 261 F.2d 347, 350 (1st Cir. 1958).[4]

[3] As here pertinent, § 8(b)(1)(A) makes it an unfair labor practice "to restrain or coerce . . . employees in the exercise of rights guaranteed in section 7 of this title;" and § 8(b)(2) makes it an unfair labor practice for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section." Section 8(a)(3), in turn, makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization . . ."

[4] For present purposes, the essential attribute of a union job referral system or hiring hall is that a union, in addition to negotiating rules governing the *employer's* management of the work place and policing those rules, provides a service similar to that provided by an employment agency, by matching out-of-work employees with job opportunities. A union may do so entirely on its own, expecting that employers will turn to the union as a source of employment referrals simply because the employers need, and know that the union is able to supply, workers. Or the union can seek in its collective bargaining agreement some understanding with the employers pertinent to the job referral system, such as that the union will be notified of all job opportunities and have an opportunity to offer candidates for employment (whom the employer may accept or reject), or that the employer will seek all, or a specified percentage, of its employees from the union-operated referral system.

The NLRB has sought to classify union job referral systems into "exclusive" and "nonexclusive" systems, and has maintained that the legality of certain union practices in operating the referral system may turn on that dichotomy. *See, e.g., Pile Drivers, Dock, Wharf and Bridge Carpenters and Drivers, Local Union 2396*, 287 N.L.R.B. No. 78 (1987); *International Union of Operating Engineers Local 406*, 262 N.L.R.B. 50 (1982), *enforced International Union of Operating Engineers, Local 406 v. NLRB*, 701 F.2d 504 (1983); *Teamsters Local 17 (Universal Studios)*, 251 N.L.R.B. 1248 (1980); *Journeymen Pipe Fitters Local No. 392*, 252 N.L.R.B. 417, 421 (1980), *enf. denied Journeymen Pipe Fitters Local 392 v. NLRB*, 712 F.2d 225 (6th Cir. 1983); *Local Union No. 174, Teamsters*, 226 N.L.R.B. 690, 699-700 (1976); *Buffalo Typographical Union No. 9 (Buffalo Courier Express)*, 202 N.L.R.B. 156 (1973).

Our central position—that the NLRA regulates union practices that affect hiring only to the same limited degree, and under the same principles, that pertain to employer hiring decisions—applies equally to all union referral systems. There are, however, two caveats.

First, because the pivotal question under § 8(b)(2) is whether the union "caused or attempted to cause" an employer to violate § 8(a)(3), it should be the case that where the union referral relationship with an employer is *nonexclusive*, the circumstances in which a union could be said to "cause" an employer not to hire a given individual are limited. *See, e.g., United Brotherhood of Carpenters, Local Union No. 1016 (Bertram Construction Co.)*, 272 N.L.R.B. 539, 543 (1984); *Hoisting and Portable Engineers, Local No. 4 (The Carlson Corp.)*, 189 N.L.R.B. 366, 366 (1971). The Board has maintained, however, that in the nonexclusive hiring hall context § 8(b)(1)(A) nonetheless forbids some forms of

In the period before the enactment of the Taft-Hartley Act, moreover, the unions in these industries typically

limited access to their hiring halls to union members. Fenton, *supra*, 9 Lab. L.J. at 506; *see* S. Rep. No. 1827, 81st Cong., 2d Sess. (1950) at 6-7 (explaining why hiring halls in the maritime industry provide stability of employment and limit corruption, but noting that before the enactment of the Taft-Hartley Act, hiring halls provisions ordinarily "oblige[d] the employer to give preference in employment to union membership.") The NLRA as originally enacted—the Wagner Act—did *not* prohibit this union membership limitation; under that Act, unions and employers could negotiate in their

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union discrimination but not others. *Compare, Chauffeur's Local 928*, 172 N.L.R.B. 2137 (1968) *with Buffalo Typographical Union No. 9*, 202 N.L.R.B. 256 (1973). At the same time the Board has declined to hold that where, as here, there is a nonexclusive job referral system, the union commits an unfair labor practice by declining to make a referral on a ground entirely unrelated to union activity. *See* Brief for the United States as *Amicus Curiae* Supporting Petitioner at 14-15. Thus to find for petitioner on the judicial duty of fair representation cause of action stated in this case would go beyond the rulings of the Agency assigned by Congress to administer the NLRA rather than leaving the question of whether that extention should occur to that Agency in the first instance. *See* Part I B of the argument, *infra*.

Second, where there is an exclusive hiring hall, or where the collective bargaining agreement specifies in some manner how the union is to make job referrals or how the employer is to use the referral system, there will be instances in which an employee's claim regarding the referral system concerns whether the contractual terms were complied with, rather than whether the operation of the system violates a public law norm stated in the NLRA. When that is the case, the principles that otherwise control the adjudication of contract-based disputes will of course govern. Thus, as to such contract-based disputes judicial relief is available, except that an employee must exhaust any applicable contractual grievance-arbitration system unless he or she attempts to do so and is thwarted by a breach of the duty of fair representation by the union. *Smith v. Evening News Assoc.*, 371 U.S. 195 (1962); *Republic Steel Corp. v. Maddox*, 378 U.S. 650 (1965); *Vaca v. Sipes*, 386 U.S. 171 (1967). (In that instance, however, any breach of the duty of fair representation claim that would have to be proven would involve the union's conduct in prosecuting the employee's grievance concerning the referral system, not the union's conduct, if any, in administering the referral system.)

collective bargaining agreements for a "closed shop," *viz.*, for a system in which only union members could be hired. *See Algoma Plywood Co. v. Wisconsin Employment Relations Board*, 336 U.S. 301, 307-11 (1949); *Colgate Co. v. Labor Board*, 338 U.S. 355, 381-83 (1949).

Whether closed shop agreements generally, and closed shop hiring hall arrangements particularly, should be prohibited became a major issue during the consideration of the 1947 Taft-Hartley amendments to the Wagner Act. *See generally* S. Rep. No. 105, on S. 1126, 80th Cong., 1st Sess. (1947) at 6, National Labor Relations Board, I Legislative History of the Labor Management Relations Act of 1947 (1985) ("Leg. Hist.") at 412; I Leg. Hist. 741 (remarks of Rep. Robison); *id.* at 1010 (remarks of Sen. Taft); *id.* at 1420 (remarks of Sen. Taft); *id.* at 1421 (remarks of Sen. Taft). Congress decided that central, and contentious matter in controversy by adding a second proviso to § 8(3) of the Wagner Act (which was incorporated into what became § 8(a)(3) of the NLRA, as amended) and by enacting an entirely new section, § 8(b)(2).[5]

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[5] The 1947 Congress also added § 8(b)(1)(A) to the Act. That section, as noted previously (*see* n.3, *supra*) makes it an unfair labor practice for a union to "restrain or coerce . . . employees in the exercise of rights guaranteed in section 7." This prohibition, this Court has held, referring to the Act's legislative history, prevents

> "unions from invading the rights of employees under § 7 in a fashion comparable to the activities of employers prohibited under § 8(a)(1)." [Citation omitted] *It was the intent of Congress to impose upon unions the same restrictions which the Wagner Act imposed on employers with respect to violations of employee rights.* [*International Ladies' Garment Workers' Union v. NLRB, ("Bernhard-Altmann")* 366 U.S. 731, 738 (1961) (emphasis added).]

Indeed, its history indicates that § 8(b)(1)(A) was intended to be, if anything, narrower than § 8(a)(1). *See* II Leg. Hist. 1138-39 (floor agreement to remove "interfere" from § 8(b)(1) although that term appears in § 8(a)(1)).

Since as we note below (n.6, *infra*) § 8(a)(1) adds nothing to § 8(a)(3) with respect to which hiring and firing decision violate

2. The second proviso to § 8(a)(3) and § 8(b)(2)—which are at the heart of this case—refer to and depend on § 8(a)(3)'s prohibition of certain employer unfair labor practices. We therefore briefly review the relevant § 8(a)(3) law.

Both before and after the Taft-Hartley amendments, the primary operative language of what is now § 8(a)(3) has made it unlawful for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." From the outset, it has been understood that the NLRA "permit[s] a discharge for any reason other than union activity or agitation for collective bargaining." *Associated Press v. Labor Board*, 301 U.S. 103, 132 (1937). *See also NLRB v. Jones & Laughlin Corp.*, 301 U.S. 1, 45 (1937); H. Rep. No. 1147 on S. 1958, 74th Cong., 1st Sess., at 19 (1935). In other words, the NLRA forbids only employer hiring and firing decisions detrimental to an employee that are "*motivated by antiunion animus.*" *Metropolitan Life Ins. Co. v. NLRB*, 460 U.S. 693, 700 (1983) (emphasis added).[6] As this Court explained in *NLRB v. Brown*, 380 U.S. 278, 286 (1965):

> Under [§ 8(a)(3)] both discrimination and a resulting discouragement of union membership are necessary, but the added element of unlawful intent is also required. . . . The discriminatory act is not by itself unlawful unless intended to prejudice the employees' position because of their membership in the union; some element of antiunion animus is necessary. See *Radio Officers' Union v. National Labor Relations Board*, 347 U.S. 17; *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1. We have determined that the "real motive" of the employer in an alleged § 8(a)(3) violation is decisive. *Associated Press v. National Labor Relations Board*, 301 U.S. 103, 132; if any doubt still persisted, we laid it to rest in *Radio Officers Union v. National Labor Relations Board*, *supra*, where we reviewed the legislative history of the provision and concluded that Congress clearly intended the employer's purpose in discriminating to be controlling. See also *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. [263, 275-76]; *American Shipbuilding Co. v. NLRB*, [380 U.S. 300, 311]; *Local 357 Teamsters v. National Labor Relations Board*, 365 U.S. 667, 674-76.[7]

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the NLRA the same must be true with respect to the relationship between §§ 8(b)(2) and 8(b)(1). We therefore concentrate in the text upon § 8(b)(2) alone.

[6] Section 8(a)(1), similarly, has been understood to require proof of an employer's "hostile motive" to make out a violation at least in situations in which the conduct—such as hiring or firing employees—is, on its face, an ordinary incident of the employment relationship and does not have a necessary destructive effect on rights protected by the Act. *See NLRB v. Brown*, 380 U.S. 278, 286 (1965). *See also, e.g., American Shipbuilding Co. v. NLRB*, 380 U.S. 300, 308-310 (1965); *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 268-69 (1963). Thus, as far as we are aware, where the question is whether an unfair labor practice was committed in the selection of employees, §§ 8(a)(3) and 8(a)(1) have always been treated as *synonymous*. *See NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967).

[7] Of course, under § 8(a)(3), *direct* evidence of an improper intent is not required; such an intent may be inferred from circumstantial evidence. *Cf. American Shipbuilding Co. v. NLRB*, *supra*, 380 U.S. at 311-12 ("where many have broken a shop rule but only union leaders have been discharged, the Board need not listen too long to the plea that shop discipline was simply being enforced."). One species of such circumstantial evidence might be, for example, that an employer has offered an explanation for the failure to hire a union activist that proves pretextual. *Cf. NLRB v. Transportation Management Corp.*, 462 U.S. 393, 398 (1983).

It is true as well that in some instances, an employer may discriminate on a ground that, *by definition*, distinguishes between applicants for hire on the basis of a union-related criteria; where that is the case, the requisite intent is necessarily established, and the only issue to be decided is whether there is sufficient justification for the intentionally discriminatory conduct. *E.g., Radio Officers Union*, *supra*, 347 U.S. at 44-48 (1954) (paying higher wages to members than to nonmembers); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 227-32 (1963) (disfavored treatment of striking employees); *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34-35 (1967) (same); *Metropolitan Edison Co. v. NLRB*, *supra*, 460

The 1947 Congress in amending the NLRA to add specified union unfair labor practices began from these well settled rules regarding *employer* unfair labor practices.

3. The Wagner Act proviso to § 8(3) carved out a broad exception to the basic prohibition stated there, permitting "encouragement" of union membership in the form of an employer agreement with a bona fide labor organization making union membership a condition of employment. The Taft-Hartley amendment to that proviso as here pertinent, however, *forbids* employers to make union membership a condition of *initial hire*, but *permits* the "*union shop*": *viz.*, an agreement specifying that once hired, the employee can be required to join the union "on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is later." [8] Congress thus eliminated that aspect of "the closed shop which requires *preexisting* union membership as a condition of employment", in order to eliminate that "barrier to free employment." S. Rep. No. 105, 80th Cong., 1st Sess. 6-7 (1947), I Leg. Hist. at 412-13 (emphasis added). The

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U.S. at 701-05 (special discipline imposed upon union activists). And this is true even if the employer contends that his *reason* for intentionally discriminating on the basis of union activity or lack thereof was not to encourage or discourage the union activity. *E.g., Radio Officers Union, supra*, 347 U.S. at 37 (fact that the "employer acted from self-interest [satisfying the demands of the union at the lowest possible cost] and not to encourage unionism" does not justify higher pay for union members); *Erie Resistor Corp., supra*, 373 U.S. at 225 (fact that the employer's "purpose in granting super-seniority [to non-strikers] was to keep its plant open" rather than to penalize strikers does not disprove the requisite § 8(a)(3) intent).

[8] A concomitant provision in the Taft-Hartley amendments to § 8(a)(3) specifies that although an employee may be required to "join" the union once employed, he or she cannot be required to adhere to union membership rules on pain of losing employment; only the requirement to pay union dues can be enforced through loss of employment. *See Radio Officers Union, supra*, 347 U.S. at 41; *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1964).

overall purpose of this aspect of the union shop amendments was more fully to implement the Act's "policy . . . to insulate employees' jobs from their organizational rights" (*Radio Officers Union v. NLRB, supra*, 347 U.S. at 40), by entirely removing the employee's exercise or nonexercise of organizational rights as a permissible ground for an initial refusal to hire.

Section 8(b)(2) of the Taft Hartley amendments, in turn, began life as the exact parallel of the new § 8(a)(3) proviso: In the bills that passed both the House and the Senate, the section that became § 8(b)(2) provided only for a prohibition upon union activity seeking to bring about employer discrimination *under a union security clause* against individuals denied membership, or terminated from membership, in a union for reasons other than nonpayment of dues, or on a discriminatory basis. *See* I Leg. Hist. 181 (H.R. 3020 as passed House, § 8(c)(7)); I Leg. Hist. 239-40 (H.R. 3020, as passed Senate, § 8(b)(2)). *See also* H.R. Rep. No. 245 on H.R. 3020, 80th Cong., 1st Sess. (1947), I Leg. Hist. 323; S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess. (1974), I Leg. Hist. 427 ("Thus, an employee, even though he loses his union membership for reasons other than those set forth, may not be deprived of his job because of a contract requiring membership as a condition of employment."); II Leg. Hist. 1012 (remarks of Sen. Taft) ("it is made an unfair labor practice for a union to try to get an employer to discharge a man *who has been improperly fired from the union*" (emphasis supplied)).

Going into the House-Senate conference on the 1947 labor legislation, then, both bills provided *in terms* for a prohibition on union activity designed to bring about adverse employment action against an employee *only where that activity was based upon union membership or lack thereof.*

In conference, one major change was made in the language of what became § 8(b)(2): the phrase "to discriminate against an employee in violation of sub-

section (a)(3)" was added.[9] Senator Taft explained the reason for this change in his report to the Senate on the Conference:

> The House managers . . . directed the attention of the Senate conferees to the fact that while the Senate bill forbade unions to discriminate against employees with respect of [sic] whom membership in labor organization had been denied on some ground other than failure to pay dues and initiation fees it did not expressly forbid a union to attempt to bring about the discharge of an employee who is not covered by a valid compulsory membership agreement. *Of course a discharge under such circumstances has been repeatedly held to be a violation of subsection 8(3) of the present act by the Board*, and since it was not the intent of the Senate to make unlawful coercion by a labor organization against employees covered by compulsory membership agreements and yet to tolerate attempts at discrimination against employee [sic] not so covered, the conferees agreed to the adoption of the phrase "in violation of subsection 8(3). [II Leg. Hist. 1539-40 (remarks of Sen. Taft) (emphasis supplied)].[10]

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[9] In addition, the language of the Senate bill was changed so that, to violate § 8(b)(2), a labor organization must not simply "persuade or attempt to persuade" an employee to discriminate against an employee, but rather must "cause or attempt to cause" the discrimination. The reason for that change was that a ban on persuasion "seemed inconsistent with the provisions guaranteeing all parties freedom of expression." II Leg. Hist. 1539 (remarks of Sen. Taft summarizing the actions taken in conference).

[10] The House Conference Report makes essentially the same point:

> Section 8(b)(2) is expanded so as to prohibit all attempts by a labor organization or its agents to cause or attempt to cause an employer to discriminate against an employee in violation of section 8(a)(3). The latter section . . . prohibits an employer from discriminating against an employee by reason of his membership or nonmembership in a labor organization, except to the extent that he obligates himself to do so under the terms of a permitted union shop or maintenance of membership contract. This provision contained in the conference agreement would, for example, prevent a labor organization from seeking to compel an employer to hire only union foremen or to discharge foremen who were not members of the union, and in this respect it covers matters which, among others, were dealt with under section 12 of the House bill. [I Leg. Hist. 548.]

The first of these sentences simply follows § 8(b)(2)'s words. The second confirms the understanding of § 8(a)(3) stated in the text at pp. 14-16 *supra*. The meaning of the last sentence of this commentary is however quite obscure: The Act, of course, generally protects employees, not supervisors, from adverse employer action (*see* §§ 2(2) and (11)), and it is not apparent in what respect the new § 8(a)(3) reference overlapped with any aspect of § 12 of the House bill, since the latter dealt only with "unlawful concerted activity" such as use of force or violence and certain kinds of picketing and strikes. *See* I Leg. Hist. 204-07 (H.R. 3020 as passed House, § 12). The most that can be said of this explanation is that it certainly does not suggest that the addition of the reference to § 8(a)(3) was intended to expand the office of § 8(b)(2) in any major way from where matters stood before conference.

Thus, § 8(b)(2) in its final form continued the two critical substantive characteristics of both the Senate and House versions of that section:

First, § 8(b)(2), *in the clearest possible terms*, imposes a prohibition on unions in taking an active role in hiring or firing decisions that is *parallel* to the prohibition placed upon employers by § 8(a)(3) of the Act. To repeat, the operative language of that provision here is "It shall be an unfair labor practice for a labor organization or its agents— . . . to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) . . . ."

Second, since, as we have seen, § 8(a)(3) is limited to adverse employer action "intended to prejudice the employees' position because of their membership in the union" (*NLRB v. Brown*, *supra*, 380 U.S. at 286), it follows that § 8(b)(2) as well is limited to union discrimination based upon union-related activity.

4. The legislative materials, we submit, make it perfectly clear that the NLRA, while making hiring decisions based on union considerations unlawful, does not go so far as to make other forms of discriminatory or

arbitrary hiring decisions that adversely affect an employee an unfair labor practice. But the NLRB, in its administration of the Act, has never recognized that clear truth. We therefore believe it is incumbent on us to digress by tracing the evolution of the Board law.

(a) Immediately after the passage of the Taft Hartley Act, the first series of issues raised under the new § 8(b)(1)(A) and (2) prohibitions concerned the impact of those sections on union job referred systems. *See*, National Labor Relations Board, *Fourteenth Annual Report* at 80-83 (1949); *NLRB v. National Maritime Union*, 175 F.2d 686 (2nd Cir. 1949). At that juncture, the NLRB, and the courts, generally concluded that employer use of union-operated referral systems is valid, as is union enforcement of a requirement for such use, as long as the referral system is open to both union and nonunion employees. "The factor in a hiring hall arrangement which makes the device an unfair labor practice is the agreement to hire *only* union members." *Del E. Webb Const. Co. v. NLRB*, 196 F.2d 811, 845 (8th Cir. 1952). *See also Hunkin-Conkey Constr. Co.*, 95 NLRB 433, 435 (1951); *NLRB v. Swinerton & Walberg Co.*, 202 F.2d 511 (9th Cir. 1953); *Eichleay Corp. v. NLRB*, 206 F.2d 799 (9th Cir. 1953).

In 1958, however, the Board "departed from earlier rulings" and sought to "establish a broader, more pervasive regulatory scheme." *Local 357 Teamsters, supra*, 365 U.S. at 676. In *Mountain Pacific Chapter AGC*, 119 NLRB 883, *enf. denied, NLRB v. Associated General Contractors*, 270 F.2d 425 (9th Cir. 1959)), the Board held that a union job referral system can violate the Act even though there is no proof that referrals through the system are based in any way on union-related criteria. The Board's theory in *Mountain Pacific* was that simply by determining which employees are to be hired, "the arrangement displays and enhances the Union's power and control over the employment status," 119 NLRB at 896:

> Employers here have surrendered all hiring authority to the Union and have given advance notice via the established hiring hall to the world at large that the Union is arbitrary master and is contractually guaranteed to remain so. . . . [T]he inference of encouragement of union membership is inescapable. [*Id.*]

Based upon this view, the Board sought to eliminate the potential for "arbitrary" union conduct by imposing requirements upon unions and employers other than the straightforward nondiscrimination on the basis of union activity requirement that § 8(a)(3) of the Act had long been held to establish.

This Court, in *Local 357 Teamsters, supra*, squarely *rejected* this effort by the Board to add to Congress' limited regulation of union job referral systems. In so doing, the Court relied heavily on the fundamental propositions about the reach of § 8(b)(2) outlined above: that the section goes no farther in regulating union activity with respect to hiring than § 8(a)(3) goes in regulating employer hiring decisions, and that as to both unions and employers, Congress intended to regulate the hiring process only to the degree of proscribing reliance upon union-based criteria in determining who should be employed:

> The Act deals with discrimination either by the employers or unions that encourages or discourages union membership. . . . It is the "true purpose" or "real motive" in hiring or firing that constitutes the test. [365 U.S. at 674-75 *quoting Radio Officers Union, supra*, 347 U.S. at 43 (footnote omitted).] [11]

To impose criteria for the operation of union referral systems that do *not* turn on any demonstrated discrimination on the basis of union activity, the Court went on, improperly usurps the decisionmaking role delegated to the Congress:

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[11] The Court went on to note, as we noted earlier, that while an intent to discriminate is a requisite element of the unfair labor practices established by § 8(a)(3) and § 8(b)(2), that intent can be proven circumstantially as well as directly. *See* 365 U.S. at 675.

> [W]here Congress had adopted a selective system for dealing with evils, the Board is confined to that system. *National Labor Relations Board v. Drivers, etc. Local Union*, 362 U.S. 274, 284-90. *Where, as here, Congress has aimed its sanctions only at specific discriminatory practices, the Board canot go farther and establish a broader, more pervasive regulatory scheme.* [*Local 357 Teamsters, supra*, 365 U.S. at 676 (emphasis supplied).]

(b) Despite this apparently clear pronouncement by this Court regarding the limited degree to which Congress intended to regulate union job referral systems through the NLRA, the Labor Board has continued in the multitude of hiring hall cases the Agency has decided since *Local 357 Teamsters* to read § 8(b)(2) (and § 8(b)(1)(A)) as proscribing union behavior in selecting employees for jobs which, if engaged in directly by the affected employer, would *not* violate the Act.

For example, in a series of rulings that seem to revive the third of the *Mountain Pacific* criteria (that the union must publish objective referral rules) rejected by this Court, the Board has held in several cases that an exclusive union hiring hall must distribute job opportunities on an announced, objective basis.[12] Yet, as we have seen, there is no parallel NLRB doctrine holding subjective employer hiring practices, without more, violative of the Act; rather, § 8(a)(3) "permit[s] a discharge for any reason other than union activity or agitation for collective bargaining." *Associated Press v. Labor Board, supra*, 301 U.S. at 132.[13]

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[12] *Journeymen Pipe Fitters Local No. 392, supra*, 252 NLRB at 421; *Local Union No. 174, Teamsters, supra*, 226 NLRB at 699-700.

[13] This is not to say, of course, that an employer who hires on an entirely subjective basis will not have a harder time rebutting a union activist's claim that he or she was not hired because of union activity than an employer who can point to objective requirements, tests, or application procedures as the reason for denial of a job. But in that instance, the relevance of the subjective character of the hiring process is purely evidentiary; the Board does not, as it does in the union hiring hall case, purport to condemn subjective processes as violative of the NLRA, without more.

Similarly, the Board has maintained that a union which does have announced standards for conducting its job referral system, or which has agreed to such standards in a collective bargaining agreement, violates the NLRA by deviating from those standards, without regard to whether that deviation was motivated by the union sentiments of the employee affected or, instead, was simply a mistake, a change in policy, or the union's interpretation of its own rules, with which the Board disagrees.[14] The theory underlying these cases is that "By wielding its power arbitrarily, the Union gives notice that its favor must be curried, thereby encouraging membership and unquestioned adherence to its policies ... The natural consequence of referral preferences is to encourage membership. *NLRB v. Ironworkers, supra*, 600 F.2d at 777.[15]

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[14] *See, e.g., International Association of Heat and Frost Insulators Local 22*, 212 NLRB 913 (1974); *International Union of Operating Engineers Local 406, supra*; *NLRB v. International Association of Bridge, Structural and Ornamental Iron Workers*, 600 F.2d 771, 776-77 (9th Cir. 1979); *Journeymen Pipefitters Local No. 392, supra*, 252 NLRB at 418; *Cell-Crete Corp.*, 288 NLRB No. 32 (1988).

[15] The Board cases do not simply hold that deviation from established referral criteria gives rise to an evidentiary presumption that the referral decision was based on union-related criteria, shifting the burden to the union to come forward with a legitimate, nondiscriminatory explanation of its behavior. *Compare, e.g., Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Rather, the Board's hiring hall cases hold that the departure from established criteria is itself an unfair labor practice, unless justified not merely by legitimate criteria, but by proof that "the action was *necessary* to the effective performance of [the union's] performance of its function of representing its constituency." *Journeymen Pipe Fitters Local No. 392, supra*, 252 N.L.R.B. at 418 (emphasis supplied). *See also* n.13 *supra*.

While the Ninth Circuit has approved this general approach (*Ironworkers, supra*), other courts have either rejected the approach, or have expressed doubts as to its validity. *Glaziers Local Union 558 v. NLRB*, 787 F.2d 1406, 1412-14 (10th Cir. 1986); *Journeymen Pipe Fitters, supra*; *NLRB v. New York Typographical Union*, 632 F.2d 171, 180-81 (2d Cir. 1980); *cf. NLRB v. Local*

This rationale is nothing but a reiteration of the Board's *Mountain Pacific* theory *rejected* by this Court in *Local 357 Teamsters, supra. See* 119 NLRB at 896, quoted pp. 20-21, *supra.* And today, as in 1957, this rationale conflicts with both premises of § 8(b)(2) as Congress wrote that provision:

First, contrary to Congress' intent, the Board's present approach does *not* parallel the approach taken in employer hiring and firing cases. All sorts of employer conduct—most obviously, the discharge of union activists on an arbitrary basis rather than a union activity related basis—may have the *effect* of discouraging union membership, but such conduct is *not* an unfair labor practice. The Board has never placed upon employers the burden placed upon the union of defending, for example, a failure to hire a union activist by proving that the hiring decisions was "necessary to the effective performance of the [employer's] function." To the contrary, "[i]t has long been recognized that an employer can make reasonable business decisions, unmotivated by an intent to discourage union membership or protected concerted activities, although the foreseeable effect of these decisions may be to discourage what the act protects." *Local 357 Teamsters, supra*, 365 U.S. at 679 (Harlan, J., concurring).

Second, and equally to the point, the Board's present regulation of union hiring halls disregards the principle that under § 8(b)(2), as under § 8(a)(3), "[i]t is the 'true purpose' or 'real motive' . . . that constitutes the test" (*Local 357 Teamsters, supra*, 365 U.S. at 675), and, therefore, "a mere showing of foreseeable encouragement of union status is not a sufficient basis for a finding of a violation of the statute" (*id.* at 679 (Harlan, J., concurring).[16]

294, International Brotherhood of Teamsters, 317 F.2d 746, 748, 749, 751 (2d Cir. 1963).

[16] The recent NLRB cases concerning regulation of union referral systems have drawn their reasoning in part from *Miranda*

(c) For present purposes, the import of the NLRB's enforcement of § 8(b)(2) and, derivatively, § 8(b)(1)(A), since their enactment is two fold:

Fuel Co., 140 NLRB 181 (1962), *enforcement denied*, 362 F.2d 172 (2d Cir. 1963). (*Miranda Fuel*, though not a hiring hall case, was decided on remand for reconsideration in light of *Local 357, Teamsters, supra.*)

The Board decided in *Miranda Fuel, first*, that § 7 of the NLRA "gives employees the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment" (140 NLRB at 185), even though § 7 in terms directs itself only to the right to engage in concerted activity of various kinds, or to refuse to do so and says nothing about the representative's conduct. The Board thereupon concluded that § 8(b)(1)(A)'s prohibition on conduct which "restrain[s] or coerce[s] employees in the exercise of the rights protected by section 7" somehow "prohibits labor organizations from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair." *Id.* Since unions, in administering hiring halls are acting independently rather than representing employees in policing the employer's actions, this aspect of *Miranda Fuel*, as applied to hiring halls, plainly contravenes the principle that § 8(b)(1)(A) is no broader than § 8(a)(1).

Second, and even more to the point for present purposes (since § 8(b)(2), as we have seen, directly covers union job referral issues, and § 8(b)(1)(A) does so only derivatively), *Miranda Fuel* revisited the territory covered by *Local 357 Teamsters, supra*, regarding the scope of § 8(b)(2). As to that section, the Board concluded once again, reiterating its basic reasoning in *Mountain Pacific, supra*, that "union membership is encouraged or discouraged whenever a union causes an employer to affect an individual's hiring status," so that proof of such an effect, without more, permits the Board to regulate the referral system closely, by evaluating the legitimacy of the criteria used by the union in running the system both generally and in particular instances; this is true, said the Board, even when "the moving consideration does not involve the specific union membership or activities of the affected employee." 140 NLRB at 187-88.

Both these lines of reasoning have been incorporated in the Board's hiring hall cases, and, as thus applied, both are inconsistent with the basic statutory analysis presented above.

This Court has, on several occasions, declined to review on the merits the validity of the NLRB's *Miranda Fuel* decision as a general matter. *Humphrey v. Moore*, 375 U.S. 335, 344 (1964); *Vaca v. Sipes, supra*, 386 U.S. at 186; *DelCostello v. Teamsters*, 462

First, § 8(b)(2), as the analog of § 8(a)(3)—and, perhaps more importantly, as the provision Congress crafted to enforce against unions the proscription upon making union membership a condition of hire—is directed at the precise question whether and to what degree unions may play an independent role in the hiring process, and has been so understood from the outset.

Second, the history of the enforcement of those sections in the union job referral context has been marked by a tendency by the Board to expand the regulation of union referral systems beyond that contemplated by Congress, as evidenced by the usual legislative materials, the statutory language, and its history. Those materials indicate that Congress intended in the NLRA to regulate union referral systems no more closely and no more loosely than the NLRA regulates employer hiring decisions when made directly by the employer.

* * * *

The sum of the matter is this: the 1947 Congress in enacting the Taft-Hartley Act went so far as to prohibit adverse union hiring decisions premised on an employee's union-related activities or lack thereof; Congress did *not* go further and enact a prohibition on arbitrary or discriminatory union hiring decisions *not* based on the employee's union activities. Thus, the substance of petitioner's NLRA count in this case does not state a good cause of action under the statute Congress wrote.

B. The NLRA Procedures For Enforcing The Statutory Norms Governing Union Job Referral Systems

Whether we are right or wrong in the foregoing analysis (and in our criticisms of the Labor Board's hiring hall decisions) that discussion certainly suffices to illustrate, once again, that "[t]he problems inherent in the operation of union hiring halls are difficult and complex." *Local 100, United Association v. Borden*, 373 U.S. 690, 694 (1963). Indeed, as we have seen, the proper resolution of these problems under the NLRA requires a sensitive reading of the legislative materials that takes into account the role of union job referral systems in their industrial context, and the needs of employers and unions in developing an efficient means of matching competent employees to job opportunities.

As a general matter, of course, precisely because of the subtle nature of both the applicable legal principles and of the practical needs of the labor relations system, the enforcement of the NLRA is committed to a *single* administrative agency in the first instance, and not to the numerous state and lower federal courts. *San Diego Unions v. Garmon*, 359 U.S. 236, 245 (1959); *Garner v. Teamsters*, 346 U.S. 485 (1953).[17] And this Court has heretofore uniformly understood this to be true with regard to cases alleged discriminatory union job referral systems:

> Whether a hiring hall practice is discriminatory and therefore violative of federal law is a determination Congress has entrusted to the Board. See *Team-*

U.S. 151, 170 (1983). For reasons stated in the text (pp. 27-41, *infra*) there is no reason in this case to undertake that task now, even as limited to hiring hall issues.

[17] There is one express statutory exception to this rule: Congress has explicitly provided for a judicial cause of action with respect to violations of a single subsection of § 8(b) of the NLRA, § 8(b)(4), prohibiting certain forms of union secondary activity (§ 303, 29 U.S.C. § 187). In addition, the statute empowers the Labor Board to bring suits by injunctions under specified circumstances, pending the adjudication of unfair labor proceedings before the Board (§§ 10(j) and (l), 29 U.S.C. §§ 160(j) and (l)), and for review in the courts of appeals of the decisions rendered by the Board in unfair labor practice cases (§ 10(f), 29 U.S.C. § 160(f)).

Garmon, and most of its progeny have, of course, involved jurisdiction over state, not federal, causes of action. The rationale of the *Garmon* doctrine, however, is not one of substantive supersession of state law, but one that rests upon the primary jurisdiction of the NLRB. 359 U.S. at 244-45. For that reason, the *Garmon* principle applies as a general matter to attempts to imply from the NLRA judicial causes of action for enforcement of the Act's express prohibitions. *Communications Workers v. Beck, supra*, 108 S.Ct. at 2647.

> *sters v. NLRB*, 365 U.S. 667 (1961). [*Farmer, supra*, 430 U.S. at 304 n.12.]

See also International Brotherhood of Boilermakers v. Hardeman, 401 U.S. 233, 239 (1971) ("review of alleged union discrimination . . . in job referrals . . . is a matter within the exclusive competence of the NLRB" where the case concerns "the legality of conduct under the National Labor Relations Act"); *Local 100, United Association v. Borden, supra* 373 U.S. at 694 (that "[t]he problems inherent in the operation of union hiring halls are difficult and complex," (citing Rothman, *The Development and Current Status of the Law Pertaining to Hiring Hall Arrangements*, 48 Va. L. Rev. 871) "point[s] up the importance of limiting initial competence to adjudicate such matters to a single expert federal agency" and makes "the conduct on which [such a] suit is centered . . . conduct whose lawfulness could initially be judged only by the federal agency vested with exclusive primary jurisdiction to apply federal standards.")

The essential procedural question with regard to petitioner's NLRA cause of action for arbitrary union job referral practices is therefore whether there are, despite these previous pronouncements by this Court, circumstances in which such a claim may be litigated in a federal district court in the first instance rather than before the NLRB. Relying principally upon *Vaca v. Sipes*, 386 U.S. 171 (1967), petitioner maintains that he may so proceed; in a nutshell, petitioner contends that he has stated a cause of action properly characterized as one for a breach of the Union's duty of fair representation, and, that being so, he may, without more, have that cause of action adjudicated in a federal district court.

In analyzing that contention, we begin from the point that the judicial cause of action for breach of the duty of fair representation is *not* one that appears in terms in the NLRA but rather is an implied cause of action. And thus far, "all of the cases this Court has . . . considered [concerning the duty of fair representation have]

involved the union's exercise of its exclusive power over the processing of grievances (including the conduct of arbitration hearings), *e.g. Vaca v. Sipes, supra; Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976); *Bowen v. Postal Service*, 459 U.S. 212 (1983), or the negotiation of the terms of employment in collective bargaining agreements, *e.g. Steele v. Louisville & Nashville RR*, 323 U.S. 192 (1944); *Syres v. Oil Workers Local 23*, 350 U.S. 892 (1955); *Communications Workers v. Beck*, 108 S. Ct. 2641 (1988)." Brief of the Association for Union Democracy et al. as *Amici Curiae*, at 14.

What petitioner seeks, then, is to extend this Court's prior jurisprudence creating an implied judicial cause of action for breach of the duty of fair representation to union conduct in administering job referral systems.

1. Given the nature of the duty of fair representation cause of action, we turn at this point to a review of the principles that generally govern the implication of judicial causes of action under statutes providing a detailed enforcement scheme for their norms of behavior.

Whether a private individual may bring a case in court, either for injunctive relief or for damages, to enforce a statutory standard of conduct when Congress has not expressly provided any such judicial cause of action is one which arises with great frequency. In recent years, the Court's "approach to the task of determining whether Congress intended to authorize a private cause of action has changed significantly, much as the quality and quantity of federal legislation has undergone significant change." *Merrill, Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 374 (1982):

> When federal statutes were less comprehensive, the Court applied a relatively simple test to determine the availability of an implied private remedy. If a statute was enacted for the benefit of a special class, the judiciary normally recognized a remedy for members of that class. *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33 (1916). Under this approach, federal courts, following a common-law tradition, re-

garded the denial of a remedy as the exception rather than the rule. . . .

In 1975 the Court unanimously decided to modify its approach to the question whether a federal statute includes a private right of action. In *Cort v. Ash*, 422 U.S. 66 (1975), the Court . . . outlined criteria that primarily focused on the intent of Congress in enacting the statute under review. The increased complexity of federal legislation and the increased volume of federal litigation strongly supported the desirability of a more careful scrutiny of legislative intent than *Rigsby* had required. Our cases subsequent to *Cort v. Ash* have plainly stated that our focus must be on "the intent of Congress." [456 U.S. at 374, 377.]

And, the post-*Cort v. Ash* cases were summarized just a few months ago in a case also involving an asserted private cause of action for a breach of a duty of fair representation:

[Whether] a cause of action to enforce a Union's duty of fair representation should be implied . . . . poses an issue of statutory construction: The "ultimate issue is whether Congress intended to create a private cause of action." *California v. Sierra Club*, 451 U.S. 287, 293 (1981) (citations omitted; see also *Touche Ross & Co. v. Redington*, 442 U.S. 560, 569 (1979). Unless such "congressional intent can be inferred from the language of the statute, the statutory structure, or from some other source, the essential predicate for implication of a private remedy simply does not exist." *Thompson v. Thompson*, 484 U.S. 174, — (1988). It is also an "elemental canon" of statutory construction that where a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies. *Transamerica Mortgage Advisers, Inc. v. Lewis*, 444 U.S. 11, 19 (1979). In such cases, "[i]n the absence of strong indicia of contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Middlesex County Sewerage Authority v. Sea Clam-*

mers, 453 U.S. 1, 15 (1981); see also *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985); *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 93 (1981). [*Karahalios v. National Federation of Federal Employees*, —— U.S. ——, 109 S.Ct. 1282, 1286 (1989).] [18]

Thus, the current general rule is that it is proper to imply a judicial remedy where Congress has provided none *only* if there is some *affirmative* indication that Congress did indeed intend judicial enforcement; in making that determination, the more complex the statutory enforcement scheme, the less likely it is that the courts will assume that Congress intended an unexpressed judicial role. *Massachusetts Mutual Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985).

2. The judicial cause of action for breach of the duty of fair representation is an implied private cause of action not simply in one sense but in *two* senses:

First, the *substantive* principle upon which that duty is based does *not* appear in terms anywhere in the NLRA; rather, the principle was first implied by this Court from the overall structure of the Railway Labor Act, 45 U.S.C. § 151 *et seq.* ("RLA"), and then imported by analogy into the National Labor Relations Act. *Vaca v. Sipes*, *supra*, 386 U.S. at 177.

Second, as we have noted, and not surprisingly, while the NLRA, in limited circumstances, expressly provides for adjudication of its substantive prohibitions in court, as opposed to before the Labor Board, the Act states *no* judicial cause of action for a breach of the duty of fair representation; again, the implication of such a private judicial cause of action began with cases decided under the RLA and was then carried over into cases in which

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[18] *Karahalios* concerned the question whether, by analogy to the NLRA, a judicial cause of action could be implied for breach of the duty of fair representation from the Federal Labor Relations Act.

the parties were subject to the NLRA. *Syres v. Oil Workers*, 350 U.S. 892 (1955).[19]

So far as we are aware, the duty of fair representation cause of action is unique in federal jurisprudence in implying *both* a substantive rule *and* a judicial remedy. It is therefore helpful in understanding the current law and in evaluating how the law should be further elaborated to understand the path of development thus far.

(a) *Steele v. L. & N.R. Co.*, 323 U.S. 192 (1944) is the RLA case in which this Court first addressed *both* the substantive principle that became known as the duty of fair representation (*id.* at 193-94) ("whether the Railway Labor Act . . . imposes on a labor organization acting by the authority of the statute as the exclusive bargaining representative of a craft or class of railway employees, the duty to represent all the employees in the craft without discrimination") *and* the availability of a judicial cause of action to enforce that duty (*id.* at 194) ("if so, whether the courts have jurisdiction to protect the minority of the craft or class from the violation of such obligation.")

The Court in *Steele* first answered the substantive question in the affirmative:

> The fair interpretation of the statutory language is that the organization chosen to represent a craft is to represent all its members, the majority as well as the minority, and it is to act for and not against those whom it represents. . . . Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . . . but it has also imposed on the representative a corresponding duty. We hold that

[19] While the substantive and procedural aspects of the duty of fair representation are interrelated, this Court made clear in *Karahalios* that the two are not inextricably linked; Congress is free to choose to relegate adjudication of a union's duties with respect to representation of employees entirely to an administrative body. 109 S.Ct. at 1287.

> the language of the Act . . . read in light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative . . . the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them. [323 U.S. at 202-03.]

Turning then to the procedural issue, the Court (applying the now-abandoned *Rigsby* approach), viewed the suit for breach of the duty that had been found implicit in the statute as cognizable in court "*unless* the Railway Labor Act itself has excluded petitioner's claims from judicial consideration." 323 U.S. at 204 (emphasis supplied). The *Steele* opinion thereupon proceeded to survey the various administrative mechanisms set up under the RLA, and to conclude that those mechanisms were *not* designed to handle any of the myriad possible "disputes between employees and their representative." *Id.* at 205. The Court concluded that "[*i*]*n the absence of any available administrative remedy*, the right here asserted . . . is of judicial cognizance" (*id.* at 207 (emphasis supplied)), adding (again applying the now-outmoded *Rigsby* reasoning):

> That right would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty or obligation and which it is their duty to give in cases in which they have jurisdiction. . . . The right is analogous to the statutory right of employees to require the employer to bargain with the statutory representative of a craft, a right which this Court has protected by . . . injunction . . . and like it is one for which there is no available administrative remedy. [323 U.S. at 207.]

See also Tunstall v. Locomotive Firemen & Enginemen, 323 U.S. 210 (1944); *Railroad Trainmen v. Howard*, 343 U.S. 768, 774 (1952) (again stressing that there must be a judicial remedy because there is "no adequate administrative remedy" under the RLA).[20]

[20] In his dissent in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), Justice Powell explained that the private cause of ac-

(b) This Court was not faced with a case squarely presenting the issue whether the implied private remedy aspect of *Steele* applies under the NLRA until *Syres v. Oil Workers, supra.*[21] Like *Steele*, *Syres* involved a situ-

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tion rulings of *Steele* and its progeny were due in large part to the *RLA's* particular history and structure:

> For almost 50 years after *Rigsby*, this Court recognized an implied private cause of action in only one . . . statutory context [other than that involved in *Rigsby*.] Four decisions held that various provisions of the Railway Labor Act of 1926 could be enforced in federal court. The case for implication of judicial remedies was especially strong with respect to this Act, as Congress had repealed its predecessor . . . after [this Court] . . . had held that judicial enforcement of its terms was not available. Convinced that Congress had meant to accomplish more through the 1926 Act, and faced with the absence of an express administrative or judicial enforcement mechanism, the Court in *Texas & N.O.R. Co. v. Railway Clerks*, 281 U.S. 548 (1930), upheld an injunction enforcing the Act's prohibition of employer interference in employees' organizational activities. Buttressed by 1934 amendments to the Act that indicated congressional approval of this step, the Court in *Virginian R. Co. v. Railway Employees*, 300 U.S. 515 (1937), extended judicial enforcement to the Act's requirement that an employer bargain with its employees' authorized representative. Finally, in *Steele* . . . and *Tunstall*. . . the Court further held that the duty of a union not to discriminate among its members also could be enforced through the federal courts. [441 U.S. at 733-34 (Powell, J., dissenting).]

[21] *Wallace v. Labor Board*, 323 U.S. 248, 255 (1948), decided the same day as *Steele*, recognizes that in negotiating agreements under the NLRA, unions may not discriminate against groups of employees *on the basis of their union membership. Id.* at 242-43.

Wallace arose before the Taft-Hartley amendments added § 8(b) to the statute. Consequently, at the time *Wallace* was decided, the only relevant prohibition was in § 8(3) of the Act, forbidding *employer* discrimination in tenure of employment "to encourage or discourage membership in any labor organization," a prohibition well understood by the time of *Wallace* to "permit a discharge for any reason other than union activity or agitation for collective bargaining" (*Associated Press v. Labor Board, supra*, 301 U.S. at 132.) *Wallace* determined that a closed shop agreement with a union, otherwise legal under the Wagner Act until the 1947 amendments, did not insulate an employer from a charge under § 8(3)

ation in which black employees complained that in negotiating a collective bargaining agreement with their employer, their union sanctioned racial discrimination against them in derogation of an implied statutory obligation, this time under the NLRA, to "represent all members of the craft without discrimination as to color." 223 F.2d 739, 741 (5th Cir. 1955).[22]

The *Syres* court of appeals dismissed the fair representation claim for lack of jurisdiction.[23] The Court, in

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where the employer knew that the union intended to exclude from membership all employees who had been members of a rival union and then to seek their discharge. 323 U.S. at 256. Since *Wallace* came out of a Labor Board adjudication, the case did not raise any implied cause of action question.

Some years later, in *Ford Motor Company v. Huffman*, 345 U.S. 330 (1953), this Court did address the substantive issue whether the NLRA imposes on bargaining representative during negotiations a general fair representation obligation, rather than one simply limited to a duty not to discriminate on the basis of union membership or lack thereof. The Court in *Huffman* observed that "the authority of bargaining representatives is not absolute" and includes an obligation to "make an honest effort to serve the interests of all those members, without hostility to any." 345 U.S. at 337.

Like *Wallace*, however, *Huffman* shed no light on the implied private cause of action question: *Huffman* arose, against the employer at least, under an entirely separate statute, the Selective Training and Service Act of 1940. And the question whether the claim against the union should properly have been pursued as an unfair labor practice rather than in court was avoided by the Court on the ground that the question had not been raised below and was unnecessary to decide since, on the merits, there had been no violation of the NLRA by the union. 345 U.S. at 332 n.4.

[22] In *Syres*, the complaining employees *were* union members who, therefore, could not complain of discrimination on the basis of union membership, but only of discrimination on the basis of race. 223 F. 2d at 740.

[23] The basis for the court of appeals ruling was *not* that the cause of action was one that had to be adjudicated before the Labor Board or not at all but, rather, that the case did not as a substantive matter involve a breach of *any* statutory duty, express or implied, since the plaintiffs were members of the union and were actually suing for breach of an understanding entered into between

a *per curiam* opinion that simply cited *Steele*, *Tunstall*, and *Howard*—and therefore did not do business with the fact that the NLRA, as amended, unlike the RLA, *does* provide both substantive norms and a remedial scheme to govern disputes between a union and the employees the union represents—reversed and remanded for a hearing on the merits. 350 U.S. 892.[24]

(c) Several years after *Syres* was decided, the Board held for the first time, in *Miranda Fuel*, *supra*, that § 8(b)(1)(A) includes by implication a duty of fair representation obligation upon unions identical to, and derived from, the duty this Court had implied previously under the RLA in *Steele*.[25] At that point, the question arose with particular force whether an implied judicial duty of fair representation cause of action could survive despite the fact that the NLRA, according to the Agency created to enforce the Act, provides an express administrative remedy for the same wrong.

The Court confronted that question in *Vaca v. Sipes*, *supra*. *Vaca* was a case of the kind now known as a "hybrid § 301/duty of fair representation" case; *viz.*, a case in which the plaintiff was alleging that an employer had breached a collective bargaining agreement with regard to him, and that he had not been able to pursue his contractual grievance successfully because

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themselves and their union regarding the position to be taken in negotiations. 223 F. 2d at 743.

[24] As we have seen, §§ 8(b)(1)(A) and 8(b)(2) had been added to the Act in 1947, to explicitly establish certain substantive standards of conduct for unions and to provide an administrative remedy, identical to that applicable to employer § 8(a) violations, for union § 8(b) violations.

[25] We note again that *Miranda Fuel*, *supra*, also decided, separately, that certain kinds of union actions—those with a direct impact on an employee's employment opportunities—violate § 8(b)(2); the § 8(b)(2) analysis in *Miranda*, upon which the later hiring hall cases predominantly rely, was not derived from this Court's duty of fair representation cases, but from the Board's independent reading (albeit in our view an erroneous one, *see* pp. 9-19, *supra*) of § 8(b)(2) itself.

the union had breached its duty of fair representation by the manner in which it pursued the grievance.

The *Vaca* Court began by stating "the decision to preempt federal and state court jurisdiction over a given class of cases must depend upon the nature of the particular interest being asserted and the effect upon the national labor policy of concurrent judicial and administrative remedies." 386 U.S. at 180. And, the Court held that there must be an "exception" to the Board's exclusive jurisdiction in such hybrid cases for three reasons:

> [1] A primary justification for the preemption doctrine—the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose—is not applicable to cases involving alleged breaches of the union's duty of fair representation.
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> [2] The existence of even a small group of cases in which the Board would be unwilling or unable to remedy a union's breach of duty would frustrate the basic purposes underlying the duty of fair representation doctrine. . . .
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> [3] [T]he courts will be compelled to pass upon whether there has been a breach of the duty of fair representation in the context of many § 301 breach-of-contract actions. . . . What possible sense could there be in a rule which would permit a court that has litigated the fault of employer and union to fashion a remedy only with respect to the employer? [386 U.S. at 180-81, 182-83, 187.] [26]

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[26] Last term, this Court, in *Communications Workers v. Beck*, *supra*, in a brief discussion, held that there was court jurisdiction over a duty of fair representation suit that involved not the administration of a collective bargaining agreement through the grievance/arbitration system but the negotiation of the agreement. 108 S. Ct. at 2647. While the Court in *Beck* did not discuss the

3. Not one of the three reasons this Court gave in *Vaca* for implying a private cause of action counsels for the same result here; the current jurisprudence regarding implication of private causes of action, moreover, clearly counsels against such an implication.

First, this is a case, unlike *Vaca*, in which "the need to avoid conflicting rules of law and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose" (386 U.S. at 181) are compelling. As we have seen, the Board has been in the process of explicating the implications of the 1947 Taft-Hartley amendments for the administration of union job referral systems since immediately after the amendments were passed, and has developed a complex set of rules applicable in various situations. Those rules were originally developed without any reference at all to the court-developed fair representation doctrine, and currently draw upon that doctrine only in small part. *See* pp. 20-25, *supra*. Thus, unlike the issues that arise in *Vaca* hybrid-type suits, union job referral issues *are* "matters . . . normally within the Board's unfair labor practice jurisdiction" (*id.* at 181), and the usual principles applicable under both *Garmon* and the recent implied cause of action cases counsel that such matters be considered in the first instance by the tribunal Congress specified.

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application of the factors relied upon in *Vaca* for creating an exception to the *Garmon* principle, we note that the duty of fair representation claim in *Beck* did share the most important factors that *Vaca* stressed as the reasons for permitting an implied cause of action despite the availability of an administrative remedy:

First, the principles applying to the permissible exaction of funds under union security clauses were developed by this Court, in cases deriving under the RLA and the Constitution, and not by the NLRB. *E.g., Ellis v. Railway Clerks*, 466 U.S. 435 (1984); *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). And second, the *Beck* case was one in which constitutional issues parallel to the statutory questions were also raised, issues which, the Court stressed, are not ordinarily adjudicated by administrative agencies and in any event "would not fall within the Board's primary jurisdiction." 108 S. Ct. at 2647-48.

Second, the notion that duty of fair representation issues must be decided in court in order to assure access to a remedy free of the General Counsel's discretion as to instituting unfair labor practice complaints has less force here than in the *Vaca* context.[27] While it may not be "assume[d] from the NLRB's tardy assumption of jurisdiction in [grievance/arbitration duty of fair representation cases] that Congress, when it enacted . . . § 8(b) in 1947 intended to oust the courts of their traditional jurisdiction" (386 U.S. at 183), there was for the most part no such jurisdiction with regard to union hiring activities before 1947. The reason is that since the closed shop was valid prior to 1947, the statute expressly permitted unions to control hiring, arbitrarily or otherwise, through union security arrangements as combined with union admission policies. Thus, the degree to which the NLRA regulates union actions related to hiring issues was one that as a practical matter did not arise before the Taft-Hartley amendments, at which time Congress squarely relegated the decisions of those issues to the Board and the institution of the requisite unfair labor practice complaints to the General Counsel.

Third, and finally, the "intensely practical considerations" (386 U.S. at 182) similar to those that in *Vaca* counselled combining duty of fair representation adjudication concerning union handling of grievances in the

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[27] We note as well that of the three reasons given in *Vaca* for its jurisdictional conclusion, the concern about the Board's processes must carry the least weight. The General Counsel's discretion regarding the institution of unfair labor practice charges is an integral part of the procedure Congress created and applies to employee protections at least as central to the Act as the duty of fair representation; these include most notably for present purposes, the right not to be discriminated against in hire by employers for union-related reasons. Under present private cause of action doctrine, the fact that Congress provided a remedy that puts in place a screening entity would, if anything, counsel *against* implying a remedy that, instead, allowed free access to an adjudicatory tribunal without any prior determination of whether the case has merit and is substantial.

same judicial action with contract-based causes of action against employers pull in precisely the opposite direction here. Claims of *employer* discrimination in employment decisions, bottomed on the NLRA, are adjudicable before the NLRB or not at all. *Local 926, International Union of Operating Engineers v. Jones*, 460 U.S. 669 (1983); *Iron Workers v. Perko*, 373 U.S. 701 (1963). Where an employer knows or should have known of union conduct violating § 8(b)(2) in administering a job referral system, and acts on the basis of that conduct in making a hiring decision, the employer violates § 8(a)(3) and will be held by the Board jointly and severally liable for any back pay due to the injured employee. *Wolf Trap Foundation*, 287 N.L.R.B. No. 103 (1988).[28] In such cases, union culpability is a prerequisite to holding the employer liable, even if only the employer is charged. Thus, to permit hiring hall discrimination cases against unions to go forward in court would mean that two adjudicatory entities may have to determine the same facts and decide the same legal issues in case arising out of the same incident.

In short, this is a case in which this Court is "compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Middlesex County Sewerage Authority v. Sea Clammers*, *supra*, 453 U.S. at 15. Those remedies are the same whether it is an employer alone who is charged with violating the NLRA through discriminatory hiring practices, or whether it is the union that is charged, alone or in addition to the employer.

4. To this point we have, for the purposes of this procedural argument, indulged the supposition that it is permissible to imply from the overall structure of the

[28] Until the recent *Wolf Trap* decision, Board doctrine permitted employers to be held liable under § 8(a)(3) whenever a union referral was indeed based upon impermissible criteria, whether or not the employer was aware of the union's culpable conduct. *Lummus Co.*, 142 NLRB 517 (1963), *enf. in part, Lummus Co. v. NLRB*, 339 F.2d 728 (D.C. Cir. 1964).

NLRA, and from § 9 in particular, a duty of fair representation that applies to unions that are acting solely in a job referral capacity. The analysis in Part IA of our argument, *supra*, in fact, compels the conclusion that any such implication is unwarranted.

The 1947 Congress, in proscribing the closed shop, directly addressed the question of what limitations should be placed upon the union role in the hiring process and concluded that the limitations under the NLRA should, in a manner basically parallel to the rule applicable when an employer hires independently, proscribe union-related discrimination *only*. This Court thereupon concluded in *Local 357 Teamsters*, *supra*—in words we quoted above and are directly in point here—that: *"Where, as here, Congress has aimed its sanctions only at specific discriminatory practices, the Board cannot go farther and establish a broader, more pervasive regulatory scheme."* 365 U.S. at 676 (emphasis supplied).

No reason appears why the courts are in any better position than the Agency to which Congress primarily committed the statute's interpretation to add to the particularized scheme Congress enacted in this particular regard.[29]

[29] It is no answer to suggest that the 1947 Congress enacted the Taft-Hartley amendments on the understanding that a judicial cause of action for breach of the duty of fair representation would be generally available, for any kind of union conduct including that specifically addressed in a narrow way by the 1947 amendments.

For one thing, it is historically inaccurate to suggest that the 1947 Congress had reason to believe that such a cause of action would be available at all under the NLRA. As noted, the first NLRA case raising the issue in any guise was *Huffman*, *supra*, which was decided in 1953. And, as developed in the text, there are sufficient structural differences between the RLA and the NLRA to make the carrying over to the NLRA of the implied cause of action created under the RLA far from a certainty.

Indeed, if Congress had in fact acted on the understanding that a judicial cause of action with respect to hiring hall discrimination was available, then its addition to § 8(b)(2) of the cross-reference to § 8(a)(3) was entirely unnecessary; on that supposition, there

II. THE LMRDA ISSUE

The second, distinct issue in this case is whether a failure to refer a union member to a job through a union job referral system open to members and nonmembers alike necessarily constitutes "discipline" within the meaning of §§ 101(a)(5) and 609 of the LMRDA.[30]

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would have been no need to "expressly forbid a union to attempt to bring about the discharge of an employee who is not covered by a valid compulsory membership agreement", or to worry about "toler-at[ing] attempts at discrimination against employee [sic] not . . . covered [by a union security clause]." II Leg. Hist. 1540 (remarks of Sen. Taft).

[30] Petitioner and his *amici curiae* seek to inject into this case a separate question: whether a failure to refer a union member for a job because of his or her opposition to the union leadership can infringe the rights of free speech protected by § 101(a)(2) of the LMRDA, 29 U.S.C. § 401(a)(2), and thereby give rise to a cause of action under § 102, 29 U.S.C. § 402. This issue, however, was, for three reasons, not appropriately raised, and is therefore not properly before this Court.

First, § 102 provides a cause of action for "[a]ny person whose rights secured by the provisions of this subchapter have been infringed." That section is, as this Court has stated, entirely "independent" of the provisions of the LMRDA that turn on whether or not "discipline" has been imposed, and requires that a specific "right secured" by the Act be invoked. *Finnegan v. Leu*, 456 U.S. 431, 439 (1982). In this instance, although § 102 was cited in the complaint as part of the heading of Count Two (App. A21), § 101(a)(2), the *substantive* section specifying the rights of free speech and assembly, was not even mentioned. Rather, the body of Count Two alleges violation *only* of § 101(a)(5) and § 609, the two sections which turn on whether there has been union "discipline"; § 101(a)(5), in particular, prohibits unions from imposing "discipline" without providing the safeguards specified, and that due process right is one of the "rights secured" by Title I of the LMRDA. Thus, the fair reading of the complaint is that the *only* substantive provisions of Title I upon which the action under § 102 is based is § 101(a)(5).

Second, consistent with the complaint, the *only* LMRDA issue *actually litigated* below was whether petitioner was "discipline[d]" within the meaning of §§ 101(a)(5) and 609. The question of infringement of the rights protected by § 101(a)(2) was never

Section 101(a)(5) provides that no member may be "fined, suspended, expelled, or otherwise disciplined" unless certain procedural protections—notice of the charges, a reasonable time to prepare a defense, and a full and fair hearing—are afforded. Section 609, in turn, makes it unlawful to "fine, suspend, expel, or otherwise discipline" a member for exercising his or her rights under the Act. And, in *Finnegan v. Leu*, 456 U.S. 431, 438 n.9 (1982), this Court indicated that the common phrase "fine, suspend, expel, or otherwise discipline" has the same meaning in both provisions.

Against this background, the term "discipline" must be ascribed a meaning that makes sense in both § 101(a)(5)

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raised, and never decided. *See* Pet. App. A, and B; Jt. App. 41-53, 59-67.

Third, the relevant "Question Presented" in this Court, again consistently with the complaint and the proceedings below, was "Whether a union's discriminatory refusal to refer its members to jobs constitutes discipline within the meaning of the [LMRDA]." Cert. Pet. (i).

This Court does not ordinarily decide issues not raised or decided below (*e.g. Delta Airlines v. August*, 450 U.S. 346, 362 (1981); *Adickes v. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Kerr v. United States District Court*, 426 U.S. 394, 405 n.9 (1970)), nor will the Court address issues not "set forth in the petition [for certiorari] or fairly included therein" (Supreme Court Rule 21.1(a); *see also, e.g., Mayor v. Educational Equality League*, 415 U.S. 605, 623 (1974); *United States v. Bass*, 404 U.S. 336, 339 n.4 (1971)).

Neither petitioner nor his *amici curiae* have suggested that there are any special circumstances here that counsel against application of these principles. *See* Brief of Petitioner on the Merits at 27; Brief for the United States as *Amicus Curiae* Supporting Petitioner at 24-26 (addressing the § 101(a)(2) issue on the merits while noting that the United States takes no position on whether the issue was "properly preserved in the lower courts", and recognizing that the Question Presented "may not encompass the [Section 101(a)(2)/102] issue"); Brief of the Association for Union Democracy et al. as *Amici Curiae*, at 6.

The question whether § 101(a)(2), as incorporated in § 102, would have provided petitioner with a cause of action had he chosen to so litigate his case is therefore one that is *not* presented and that this Court should *not* reach in this case.

and § 609. Since the first consequence of denominating a certain form of union action detrimental to an employee as "discipline" is that the procedures specified in the LMRDA must be followed before the decision can be made and implemented, the first consideration in construing the term "discipline" is whether the action is of a kind that Congress would, as a matter of policy, intend to surround with these procedural prerequisites.

Finnegan v. Leu, *supra*, draws the lesson from the statute, its structure and its history that "discipline," as used in the LMRDA, covers only union actions that affect a "member's rights or status *as a member* of the union." 456 U.S. at 437 (emphasis in original). A union refusal to refer an employee out of a hiring hall used both by members and non-members can not be brought within that meaning. *See* point A below. Moreover, as we show next, the term discipline in the LMRDA context is also limited to union actions taken to enforce the organization's norms and which are intended to signify the *union's* moral condemnation for the member's breach of those norms. Plainly, as a general matter, a union officer's decision—made on his own and not pursuant to any union rule—not to refer a political opponent to a job does not come within that concept of discipline. See point B below.

A. *Finnegan* presented the question of whether removal of a union member who is also a union employee from his union employment constitutes "discipline" within the meaning of § 609. If so a termination of a member-employee from his union position because of his exercise of speech rights generally protected by § 101(a)(2) would constitute a *per se* violation of § 609.[31]

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[31] *Finnegan*, as noted above (at n.30, *supra*), treated as an entirely separate question the issue of whether a member's free speech rights could be "infringed" within the meaning of § 102 of the Act by retaliatory actions that do *not* constitute "discipline" within the meaning of the statute. *Sheet Metal Workers v. Lynn*, —— U.S. ——, 109 S. Ct. 639 (1989), which held that removal of an elected union officer for advocating a particular position at a union meeting does violate the LMRDA, was premised entirely upon § 102 of the Act; the *Lynn* Court did *not* hold that removal of an elected union officer constitutes "discipline."

The *Finnegan* Court held that "otherwise discipline" refers *not* to all retaliatory or punitive actions taken against members, but *only* to those "retaliatory actions that affect a union member's rights or status *as a member* of the union"; *viz.*, those that "impinge upon incidents of union membership." 456 U.S. at 437 (emphasis in original)[32]

The Sixth Circuit in this case, relying on *Finnegan*, and following earlier Tenth and Eleventh Circuit decisions, held that where a union operates a hiring hall open to members and nonmembers alike, a denial of referrals does not, without more, deprive an employee who happens to be a union member of any "incident[] of union membership" and thus does not constitute § 101(a)(5) "discipline."[33]

The United States objects that *Finnegan* should be read, contrary to its plain language, as holding that whether union action is "discipline" turns upon a distinction between union action affecting the rights of rank-and file members and action affecting the rights of officers, rather than upon a more general rule separating union action affecting incidents of membership from other

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[32] That "otherwise disciplined" is a limited term is confirmed by reference to other sections of the statute, and to the legislative history. LMRDA § 401(e) assures each member "the right to vote for or otherwise support the candidate or candidates of his choice, *without being subject to penalty, discipline, or improper interference or reprisal of any kind.*" (Emphasis supplied). Similarly, an earlier version of the free speech provisions of the bill protected the rights to engage in free speech "without being subject to penalty, discipline or interference of any kind." National Labor Relations Board, II *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959* at 1102, 1119. Plainly, then, the framers of the legislation understood "discipline" to be a concept narrower than "penalties" or "reprisals" generally.

[33] *See, Turner v. Local Lodge #455 International Brotherhood of Boilermakers*, 755 F.2d 866 (11th Cir. 1985); *Hackenburg v. International Brotherhood of Boilermakers*, 694 F.2d 1237 (10th Cir. 1982).

kinds of union action. Brief for the United States as *Amicus Curiae*, *supra*, at 20-21. The Government's objection turns upon a supposed anomaly in "prohibit[ing] a union from expelling a member of the rank-and-file from a members only hiring hall for his political opposition to a union's leadership, but . . . permit[ting] the union to impose the same sanction for the same reason if the hiring hall includes some non-members." *Id.* at 21.

Looking at the federal labor statutes as a whole, however, there is no such anomaly. First of all, as we have seen (n. 4, *supra*), exclusive hiring halls may not be run on a "union members only" basis; thus the Government starts from a quite limited premise. Second, the case the Government posits would in any event constitute an NLRA § 8(b)(2) violation (and might constitute an LMRDA § 101(a)(2) violation). Sections 101(a)(5) and 609 are not catchalls; and there is no basis for ascribing to Congress the intent to stretch those sections far beyond their limited reach as authoritatively delimited by this Court in order to add an additional cause of action for unlikely cases.

The fact of the matter is that the term "discipline" in § 101(a)(5) is part of a provision which determines the circumstances in which *the procedural protections* stated there apply. Looked at in that way, the scope of that term cannot, as the Government argues, possibly depend on whether or not the "predictable effect [of the union action] is to punish or deter the exercise of rights protected by the Act." Brief for the United States at 23. For § 101(a)(5) proceeds on the premise that the *substantive* rule being enforced is valid, but that procedural protections are nonetheless required. Given that premise the Government's proposed definition of discipline which covers invalid as well as valid norms is hopelessly overbroad.

B. There is, in addition, quite a separate reason why union action of the kind involved in this case is not "discipline," a reason that would obtain whether the

right to use the union hiring hall were open to nonmembers or not.

"Discipline is the criminal law of union government." Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 Yale L. J. 175, 178 (1960). That being so, the distinction between "discipline", subject to the procedural protections of § 101(a)(5) and other union actions should turn not on whether the union action is detrimental to the member in the sense that the action causes him *some* injury, economic or otherwise, but on whether the union action is one that, like the criminal law, carries with it a measure of moral condemnation by the community as a whole. *See generally* La Fave & Scott, *Criminal Law* (1972) at 11 (since both civil and criminal law may result in judgments equally detrimental to the defendant, "the only real basis for distinction between crimes and civil wrongs lies in the moral condemnation which the community visits upon the criminal"). In this instance, the relevant community is the union as an institution, and the relevant injury which distinguishes union "discipline" from other union action is the *particular* injury of stigma in, or symbolic ostracism from, the union community.

Section 101(a)(5), after all, speaks of "charges" and time to prepare a "defense," terms that are derived from criminal law concepts and therefore assume that the member is alleged to have violated some rule of *conduct* imposed by the *union as an entity*. *See Detroy v. American Guild of Variety Artists*, 286 F.2d 75, 81 (2d Cir.), *cert. denied*, 366 U.S. 929 (1961) ("any member against whom steps are taken *by the union in the interest of promoting the welfare of the group* is entitled to [the] guarantees [provided by § 101(a)(5)]" (emphasis supplied)); *Miller v. Holden*, 535 F.2d 912, 915 (5th Cir. 1976) (union action is "discipline" only when "it is undertaken under color of the union's right to control the member's conduct in order to protect the interests of the union or its membership," citing and paraphrasing Etelson & Smith, *Union Discipline Under the*

Landrum-Griffin Act, 82 Harv. L. Rev. 727, 734 (1969)).[34]

This approach leads to results that accord both with practical sense and with the overall policies of the Act.

First, since § 101(a)(5) requires notice and a hearing to the adversely affected employee; "[i]t seems apparent, as a matter of statutory construction, if § [101(a)(5)] were construed to apply to removal of a person from, or addition of a person to, a referral list . . . the statute would require an empty ritual." *Turner v. Local Lodge #455 Boilermakers*, *supra*, 755 F.2d at 870; *see e.g. Macaulay v. Boston Typographical Union No. 13*, 692 F.2d 201, 204-05 (1st Cir. 1982) (employee reclassified as "not at the trade" because he did not report for work for two years, and therefore dropped from the priority list for jobs was not "disciplined" within the meaning of § 101(a)(5)). *Cf. Figueroa v. National Maritime Union*, 342 F.2d 400 (2d Cir. 1965).

Where the union is acting as the administrator of a job referral system for union and nonunion members alike, much as an employment agency might do, its function is to administer an allocation scheme, according to criteria that do not purport to pass any moral judgment by the union upon the member (or nonmember's) conduct. In that circumstance, under the "moral condemnation" approach just outlined there is no union "discipline," and the Act's prescribed procedures need not be followed.[35]

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[34] The United States quotes this same portion of *Miller v. Holden*, and the Etelson & Smith commentary, as if those authorities supported its position. Brief for the United States at 21, 23. But their point, as we understand it, is not that *any* action that "deter[s] the exercise of rights protected by the Act" (Brief for the United States at 23) is "discipline," but that only such actions having this effect as express the condemnation of the union as a whole for violation of a union-prescribed norm of behavior, are "discipline."

[35] Similarly, where the union, in administering the allocation scheme, does use denial of referrals as a means of enforcing a norm

Second, where, as here, the allegation is that officials of the union, to stifle their political opposition, retaliated against certain individuals, there is no sense in which the moral opprobrium of the *union as a whole* is being visited on the victims: No rule of conduct imposed by the union community, designed to protect the union as a whole, is involved, nor is any official condemnation in the name of the union pronounced. In such a case, the complaint covers an *abuse* of power by the officials *for their own ends* rather than a legitimate exercise of power "in the interest of promoting the welfare of the group" (*Detroy*, *supra*, 286 F.2d at 81). This abuse of power is no more "discipline" under § 101(a)(5) than similar retaliation against political opponents by public officials—even if substantively unlawful and actionable for that reason—is a criminal conviction, subject to the procedural requirement of, for example, the Sixth Amendment, or the Double Jeopardy Clause.[36]

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of behavior, but the norm is one imposed not by the union itself but by the union and the employer together in the collective bargaining agreement, there is no *union* discipline, *viz.*, no expression of moral opprobrium by the union as an entity; rather, the rule is typically one that relates to the efficiency of the workplace. *See Figueroa v. National Maritime Union*, *supra* (contract rule against hiring any employee known to have a narcotics violation); *Turner v. Local Lodge #455 Boilermakers*, *supra* (contract rule against wildcat strikes); *Hackenburg v. International Brotherhood of Boilermakers*, *supra* (same).

[36] On the other hand, if, upon the evidence, it appears that refusal to refer an individual to jobs by a union job referral system was indeed imposed as part of the sentence in what was otherwise a true disciplinary action in the sense just described, the disciplinary process *as a whole* would affect the disciplined individual "as a union member," since the entire point of such a process would be to judge his behavior as a member of the union community. In that case, the fact that the particular sentence imposed included a job referral penalty would not remove the protections of §§ 101(a)(5) and 609.

The case the United States regards as "most nearly on point" to this one (Brief for the United States, at 21-22), *Murphy v. International Union of Operating Engineers, Local 18*, 774 F.2d 114 (6th Cir. 1985), *cert. denied*, 475 U.S. 1017 (1986), was actu-

Thus, the answer to the LMRDA question posed by the *certiorari* petition is that "refusal to refer [a union] member to jobs," "discriminatory" or otherwise, is *not*, in itself, "discipline." The ruling of the Court of Appeals with respect to the LMRDA question is therefore correct.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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ally a case of the kind described in this note, and not one analogous to the present case: According to the findings in that case, the job referral penalty was imposed after a conviction by the union as a whole for theft, and was therefore part of the disciplinary sentence (albeit one not imposed in the official proceeding itself).